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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 305

E. J. THOMAS, J. R. MCDONALD, J. R. MASON, E. G. WLLIAMS and A. C. CARPY,

Petitioners,

vs.

EL DORADO IRRIGATION DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Petitioners,

vs.

EL DORADO IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision (R. 306) of the Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on March 30, 1942, rehearing denied with

amendment to opinion May 29, 1942, which affirmed the interlocutory decree of the District Court of the Northern District of California, Northern Division, rendered against petitioners on March 8, 1941. (R. 255, 263.)

OPINION BELOW.

Opinion of the Circuit Court of Appeals, 126 Fed. (2d) 922, ... Fed. (2d) ..... (R. 292, 307.)

JURISDICTION.

The decision in the Circuit Court of Appeals was rendered March 30, 1942, and rehearing denied with amendment to the opinion May 29, 1942. (R. 306, 307.) The mandate was stayed until disposition of the case by this Court. (R. 308.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C., paragraph 347 (a)).

STATUTES INVOLVED.

Municipal Bankruptcy Act of May 24, 1934, c. 345, (48 Stat. 798), 11 U. S. C. 301-303, adding Sections 78-80 to the Bankruptcy Act of 1898; Act of August 16, 1937, c. 657 (50 Stat. 654), 11 U. S. C. 401-404, adding Sections 81-84; and Act of June 22, 1938, c. 575, Sec. 3 (b) (52 Stat. 940). Principal California Statute involved is "the California Irrigation District Act", Cal. Stat. 1897, p. 254, as amended.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent El Dorado Irrigation District, a California irrigation district, for confirmation of composition of debts under Chapter IX of the Bankruptcy Act of 1898 as amended. (11 U. S. C. Sec. 401-404.)

The matter came on before the District Court for hearing February 27, 1940 (R. 49), on the petition filed by the El Dorado Irrigation District, hereinafter called the district, filed October 7, 1938 (R. 2, 23) and the answer and objections to the petition filed by the petitioners herein who are creditors of the district. (R. 23.)

The district is an agency of the state organized under Cal. Stats. 1897, p. 254 as amended (R. 2), popularly known as "the California Irrigation District Act". The district comprises 30,702 acres of land situate in El Dorado County, California. (R. 2.) The office of the district is located in the City of Placerville, in that county. (R. 2.)

The district had issued $688,000 principal amount of interest bearing public bonds dated March 1, 1927 (R. 14) in denominations of $1000 bearing 6% interest, payable semi-annually and represented by interest coupons (R. 3) and which mature from January 1, 1948 to January 1, 1967 (R. 12), none of said bonds maturing until 10 years after the date of the filing of the petition. The district also had outstanding $24,437.77 in warrants. (R. 14.)

The district applied to the Reconstruction Finance Corporation (herein referred to as the R. F. C.), for

a loan of $360,500 to refinance this debt (R. 14) on the basis of 50.5% of the principal and 33-⅓% of a portion of the interest. (R. 19.) The loan was granted September 26, 1934 (R. 67) and the district proposed to issue 4% refunding bonds for the amount of the loan to be delivered to the R. F. C. (R. 19.)

After obtaining the loan from the R. F. C. to enable the district to undertake its refunding operation, 95% of the bonds were deposited in escrow in 1935 (R. 67) for delivery to the treasurer of the district upon payment of $505 per $1000 bonds, plus a small amount of interest.

This district on February 9, 1935 filed a bankruptcy petition under the first municipal bankruptcy act in which proceeding a judgment of dismissal (R. 130) was entered after that act was held unconstitutional. In that proceeding, the Court had made an order (R. 64, 67) authorizing the R. F. C. to purchase 634 bonds of the 688 bonds of the district and the warrants then deposited in escrow.

Based on the title thus acquired the R. F. C. filed a consent to this second bankruptcy proceeding (R. 19) reciting that it had purchased $664,000 of bonds and $24,437.77 of warrants of the district, this being 96% of the bonds and warrants of the district.

These dates and recitals are important because the first point which the petitioners seek to have reviewed in this Court is the point that the district subsequent to 1935 paid off one of the warrant creditors at the rate of 82½% of its claim, thereby, petitioners contend, creating an unlawful preference and tainting the

composition with bad faith. (This was 82½% of both principal and interest, the interest amounted to more than half as much as principal.)

Both bonds and warrants are of the same character. Section 39 of the California Irrigation District Act, Stats. Cal. 1931, page 122, provides for one levy to be made annually against the value of the land of the district for both the warrants and bond indebtedness. Both are payable from the same source and therefore are in the same class. Title 11 U. S. C. Sec. 403 (b).

The loan obtained from the R. F. C. was slated to pay roughly 50.5% of principal of bonds and of warrants. (R. 14, 15.) After obtaining this loan from the R. F. C. the district filed its first bankruptcy petition February 9, 1935. (R. 129.) A judgment was entered dismissing the bankruptcy petition. (R. 130.) Thereafter the district made an offer of compromise which was accepted by the California National Bank, receiver holding $16,286.33 including interest of warrant indebtedness. (R. 155, 132.) It is contended by petitioners that the plan of composition was thereby abandoned and could not thereafter be approved on the basis of 50.5 cents. *Roberts v. Board of Public Instruction,* 117 Fed. (2d) 943; *U. S. v. Greer Dr. Dist.,* 121 Fed. (2d) 675; *Clarke v. White,* 12 Pet. 178, 9 U. S. (L. Ed.) 1046; *Zavelo v. Reeves,* 227 U. S. 625; *Texas Hotel Corp. v. Waco Dev. Co.,* 87 Fed. (2d) 395, 399; *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 60 S. Ct. 221; *American United Mutual Life Ins. Co. v. City of Avon Park,* 311 U. S. 138, 61 S. Ct. 157.

It is perfectly obvious that the change in the plan of composition omitting reference to the warrant indebtedness is a bold subterfuge to avoid the charge of bad faith made by petitioners. This is obvious from the R. F. C.'s "acceptance" of the plan of warrant liquidation as well as the bond plan. (R. 19.) The board of directors of the district in its resolution adopt a plan for composition of the entire bond and warrant debt. (R. 14.) The Court had authorized the purchase of warrants as well as bonds. (R. 65, 67.) The plan of composition therefore still undeniably includes the warrants.

Findings and decree were entered in this case March 8, 1941. (R. 241, 243.) Prior thereto Congress passed Section 3, Public 669, 76th Congress, approved June 28, 1940, as follows:

> "Before concluding the hearing, the judge shall carefully examine all of the contracts, proposals, acceptances, deposit agreements, and all other papers relating to the plan, specifically for the purpose of ascertaining if the fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue—and shall take evidence under oath to make certain whether or not any such practice obtains or might obtain.
>
> "After such examination the judge shall make an adjudication of this issue, as a separate part

of his interlocutory decree, and if it be found that any such practice be possible, he shall forthwith dismiss the proceeding and tax all of the costs against such fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, or against the petitioner, unless such plan be modified within the time to be allowed by the judge so as to eliminate the possibility of any such practice, in which event the judge may proceed to further consideration of the confirmation of the plan."

There is no evidence in the record on this matter. There was no examination on oath or otherwise by the Court to determine whether or not the practice frowned upon by Congress had obtained or could obtain. The burden of proof is on the district. *In re Cook,* 104 Fed. (2d) 981.

The third point which petitioners make is that the plan of composition is unfair and that there is no evidence in the record to sustain the legal conclusion that the district can pay no more than 50.5 cents. None of the bonds will mature until 1948. Food prices, labor, clothing and all materials, have advanced sharply. Rents and land values have risen. The most that the taxpayers in this district should have sought was an adjustment of interest. Most of the material facts in the record are stipulated. It was stipulated that the assessed value of the bare lands of the district approximated $2,000,000. (R. 98.) The average uncollected taxes for nine years was only 7.4% (R. 98) whereas tax levies are made for 15% more than the budget under Section 60 of "the California Irrigation

District Act", Cal. Stat. 1919 page 669. The County of El Dorado assesses the value of the land in the district at $921,000 (R. 134), and the improvements on these lands at $913,000. Yet a plan paying $360,500 is approved. And all of this is exclusive of the real property in the City of Placerville, which is also within the irrigation district and subject to unlimited *ad valorem* taxation by the district. The county in which this city is situated assesses the land within the city at $296,350 and the improvements at $787,280, yet no account is taken of the taxpaying ability of the property within the city. All land sold at tax sale to the district has been resold and placed back on the tax roll (R. 223) proving that the value of the security for the whole debt is ample to pay the debt in full. Testimony from rural inhabitants operating only about 600 acres out of at least 30,000 acres was relied upon for proof of the fairness of the drastic scaling down of tax secured indebtedness herein demanded. The aggregate city and county assessed value of all lands, improvements inside of the district is the sum of $2,917,730 and it was stipulated that this was not over 50% of the actual value, so that the real value of this property subject to tax would equal $6,000,000. (R. 134.) This is almost 1000% of the old indebtedness, and almost 2000% of the composition offer, of $360,500.

The County of El Dorado, Placerville Grammar School District, the El Dorado High School district overlap this area, and none of the bonds of these districts have been worth on the market less than par (R. 135) nor have any of these issues been in default since 1928. (R. 135.)

The capital assets of the district including office buildings, water rights, reservoirs and pipe lines are the fair value of approximately $600,000. (R. 136.)

The Court failed to take into consideration or even to require evidence of the duty and ability of the real property in the City of Placerville to pay irrigation district taxes. All the land of this substantial city is forever liable to the last city lot to pay taxes for the bonds sought to be scaled down. Yet the city is substantially ignored as a taxpaying factor. The revenue collecting ability of the district was not gone into except as to farmers holding about 600 acres of pear orchards.

The City of Placerville is included in the boundaries of the district and comprises 1160 acres. (R. 219.) It is the famous "Hangtown" of California gold rush days only it is not an abandoned city but a thriving and important mountain city with a population of 2320 as the census will show. It is a county seat and even in the days of horse drawn vehicles registered over 3000 tolls per day over its transcontinental carriage route.

No testimony whatever was introduced as to the wealth of this little city nor of its tax paying ability.

The witnesses who testified told mainly of ups and downs of the Bartlett Pear industry, utilizing but 20% of the acreage of the district and which is the most important crop in the district. (R. 227, 155, 61, 62.)

But not only the pear growers on 600 acres are obligated to pay taxes. (R. 176.)

The studies made related to these 600 acres only and consequently the "ability to pay" was not the ability to pay of the taxpayers holding 30,000 acres, nor land in the City of Placerville, but of 600 acres only.

QUESTIONS PRESENTED.

1. Where a municipal bankruptcy plan of composition was accepted prior to 1936 by over 90% of the bondholders who surrendered their bonds and accepted 50½ cents on the dollar of principal in full settlement of their claims and thereafter the public debtor, and prior to the enactment of the amended municipal bankruptcy law and (after the original municipal bankruptcy law had been declared unconstitutional) pays one of its important creditors at 82½% of principal and 82½% of interest and after the amended municipal bankruptcy law was enacted files its petition again for composition of its debts and seeks a judgment requiring its remaining original creditors to accept 50.5% of principal alone, does the payment of 82½% to its one creditor constitute an unlawful preference and bad faith so as to invalidate the plan of composition, as petitioners contend?

2. Does Section 96, 11 U. S. C. apply to a municipal bankruptcy case wherein a preference is shown in favor of one of the creditors?

3. Is an interlocutory decree valid which was entered after the enactment of c. 438, Secs. 2, 3, 54 Stat. 668, 669, requiring the Court to investigate the

circumstances surrounding the deposit of the securities and whether the fiscal agents of the district were or were not improperly compensated, where the Court made no such investigation?

4. Where the bonds of a public debtor are secured by the unlimited ad valorem power of taxation upon all the lands within its boundaries whether agricultural, industrial, mining or urban, and where evidence introduced to show the fairness of the plan of composition concerned only the ability of a certain small section of the agricultural area and did not include an examination of the ability of 5/6 of the lands, nor of the area of an important city within that area to pay taxes, and the property in that city is equally and irrevocably subject to taxation to pay the last dollar of irrigation district indebtedness, is the plan of composition not unfair as a matter of law?

5. Where the findings and decree contain only conclusions of law as to the fairness of the plan of composition, should the case not have been remanded for special findings on the facts?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. We submit that this Court should decide each of the "Questions presented" set out above.

In *American United Mutual Life Insurance Company v. City of Avon Park,* 311 U. S. 138, this Court for the first time considered the procedure under the municipal bankruptcy act, and declared:

> "Beyond that is the question of unfair discrimination to which we have adverted. Compositions under Ch. IX, like compositions under the old Sec. 12, 11 U. S. C. A. Sec. 30, envisage equality of treatment of creditors. Under that section and its antecedents, a composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another. In re Sawyer, Fed. Cas. No. 12395; In re Weintrob, D. C. 240 F. 532; In re M. & H. Gordon, D. C. 245 F. 905."

We submit it is an essential feature of all composition proceedings that creditors should receive equality of treatment. Where all other creditors received 50.5 cents of principal and one creditor received 82.5 cents of principal and interest, there is not equality of treatment and this Court ought to determine, we submit, whether the principle of equality of treatment applies to municipal bankruptcy cases.

2. The Court below has decided another important question of law incorrectly, we submit, which is whether where one creditor has been preferred by receiving a bonus payment to induce him to accept the plan of composition, the statutory rule as to preferences set forth in Tit. 11 U. S. C. Sec. 96 cures the preference. The lower Court has so held. We submit the conclusion is erroneous and establishes a principle which should not be followed or sanctioned in municipal bankruptcy cases. We submit Sec. 96 does not apply to a composition case under Chap. IX of the Bankruptcy Act.

3. The trial Court has completely ignored the specific direction of the bankruptcy statute contained in the amendment of June 28, 1940. (c. 438, Secs. 2, 3, 54, Stats. 668, 669.) By this section the Congress directed that the judge before concluding the hearing should make an examination "specifically for the purpose of ascertaining if the fiscal agent, attorney or other person, firm or corporation promoting the composition—has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof", and that the judge should make an adjudication of this issue as a separate part of his decree. This mandatory instruction was not followed, either in the examination directed or in the interlocutory decree. We submit this Court ought to declare that such direction in the statute is mandatory.

4. We submit that as a matter of law where the examination in the trial Court pertained only to one-sixth of the lands within the public debtor, which lands are the security for the bonds sought to be scaled down, and there is an important city in the district, and no consideration is given to the taxpaying ability of the area within the city or in five-sixths of the land not intensively cultivated, the plan of composition is not shown to be fair as a matter of law, and this Court ought to determine that all important sources of taxpaying ability should be considered by the Court.

5. Where the findings and decree contain only conclusions of law as to the fairness of the plan of composition, the case should have been remanded for further findings. There is a conflict in the decision of

the very lower Court from which this proceeding stems, the conflict being between the decision in this case and in the case of *Lorber v. Vista Irr. Dist.*, 127 Fed. (2d) 628. This Court should, we submit, determine the question involved.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of said Court in the case numbered and entitled in its dockets as "No. 9851, E. J. Thomas, J. R. McDonald, J. R. Mason, E. G. Williams and A. C. Carpy, Creditors of the El Dorado Irrigation District, Appellants, v. El Dorado Irrigation District, Appellee", and that the decree of said Court be reversed by this Court with directions to dismiss the bill, and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
August 12, 1942.

E. J. THOMAS,
J. R. MCDONALD,
J. R. MASON,
E. G. WILLIAMS,
A. C. CARPY,
Petitioners.

W. COBURN COOK,
Counsel for Petitioners.

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Petitioners,

vs.

EL DORADO IRRIGATION DISTRICT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

FACTUAL BACKGROUND OF THE CASE.

A statement of the facts surrounding the case is made in the preceding petition.

I. THE PLAN OF COMPOSITION DISCRIMINATES UNFAIRLY AGAINST THE APPELLANTS WHO ARE CREDITORS OF THE PUBLIC DEBTOR AND IN FAVOR OF THE RECEIVER OF THE CALIFORNIA NATIONAL BANK. THE PREFERENCE IN FAVOR OF THAT CREDITOR CONSTITUTES LACK OF GOOD FAITH.

In *Luehrmann v. Drainage Dist. No. 7,* 104 Fed. (2d) 696, 308 U. S. 604, which was the first important case on the question of consent involving the Reconstruction Finance Corporation and in which case certiorari was denied by this Court, a case which has been repeatedly cited by other Courts and by the Court below, one of the contentions made was that the bondholders who had already scaled their debt before the petition was filed could not be counted as acceptors of the plan. The Court declared: "it is apparent that all parties to the transaction acted upon the understanding that the disbursements made were in conformity with the plan of readjustment then in process under the first Act and later continued in substance under the second Act." And for this reason these classes of bondholders retained their original status and were entitled to be counted acceptors of the plan.

In the case of *Bekins v. Lindsay Strathmore Irrigation District,* 114 Fed. (2d) 680 at 684 the lower Court quoted with approval the language of the District Court as follows:

> "we think it clear that the R. F. C. loaned its money for the benefit of the district and that the district accepted the financial help from the R. F. C. with the joint central purpose and mutual intent that all outstanding bonds be kept alive until such time as R. F. C. determined that the

> project of bond debt reduction agreed to had been attained,"

A transaction which took a period of some six years.

It would seem quite obvious that all of the rules regarding good faith, discrimination, unfair or double dealing should be kept alive and operative during all of this period of time, and would not be cut off by the operation of 11 U. S. C. Section 96. The filing of the petition has nothing whatever to do with the undertaking of the plan of composition because obviously the district has to have its 51% before it files the plan, and it may have been soliciting those consents over a long period of time. It was said by the lower Court in *West Coast Life v. Merced Irrigation District,* 114 Fed. (2d) 654 at 666:

> "It may be safely stated that from the date last mentioned up to the first suggestion of relief through R.F.C. and thereafter, the problem has been a continuous one of refinancing for the district."

This was a long period of time.

Subdivision j of Section 403 (11 U. S. C.) was enacted for the very purpose of creating the legal fiction that "The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the

effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition." 114 Fed. (2d) at 667.

The defeated parties in the *West Coast Life* case argued that subdivision j was not enacted until after the R. F. C. had acquired the bonds. The Court cited the *Luehrmann* case, supra, and pointed out that in that case as in the *Merced* case it was provided that the outstanding bonds should not be cancelled until refinancing was complete, and the question was whether the old bonds were still outstanding. The Court in the *West Coast Life* case at page 668 refers to the discussion in Congress where the committee pointed out that before the Act went into effect there were a number of municipalities which engaged in partial refunding, and in the absence of this new law they would be "completely at the mercy of a recalcitrant minority", and so passed subdivision j to get around the decision in *City of West Palm Beach,* 96 Fed. (2d) 85, holding that consenters to an executed plan out of Court cannot come into Court and consent. But the Ninth Circuit Court declared: "However, the section does provide that the partial completion of a plan 'shall not be construed as limiting or prohibiting the effect of this title'."

The main point here is that the plan is still in course of being accepted.

To arrive at the conclusion that the payment of 82½% to the California National Bank does not vitiate the plan of composition because it is unequal treatment in favor of one creditor, repudiates and destroys the very basis upon which the consents to the plan are considered valid in every previous case.

We take it that it is well established that the plan of composition in these cases is a continuing transaction which may have been commenced before the enactment of the municipal bankruptcy act, but is nevertheless a plan of composition and so the consents are good. It is not thinkable that the Court would adopt a theory of the continuity of the plan of composition in order to validate the consents on the one hand and then hold that because a claim was paid the 82.5% February 5, 1937 which was more than one year prior to the filing of the bankruptcy petition it does not constitute a preference under Stat. 11 U. S. C. A. Sec. 96 when 90% were paid the composition figure of 50.5% in 1933-35. The plan cannot be a continuing plan for one purpose and not be a continuing plan for another purpose.

Furthermore, bad faith is shown by the whole transaction. *Roberts v. Board of Public Instruction,* 117 Fed. (2d) 943; *U. S. v. Greer Dr. Dist.,* 121 Fed. (2d) 675; *Clarke v. White,* 12 Pet. 178, 9 U. S. (L. Ed.) 1046; *Zavelo v. Reeves,* 227 U. S. 625; *Texas Hotel Corp. v. Waco Dev. Co.,* 87 Fed. (2d) 395, 399; *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 60 S. Ct. 221; *American United Mutual Life Ins. Co. v. City of Avon Park,* 311 U. S. 138, 61 S. Ct. 157.

TITLE 11, SEC. 96, U. S. C. A. APPLIES TO PRIVATE BANKRUPTCY ONLY.

Section 96 has no application to this case whatever. It merely provides what a preference is so far as private bankruptcy is concerned. The four months period relates to obtaining judgments and unlawful preferences by creditors of insolvent private debtors. It seems obvious on the face of the statute itself that it does not apply in any of its operations to a public debtor nor to the municipal bankruptcy section of the bankruptcy act. See *Evergreen Farms Co. v. Willacy Co. Water Control & Impr. Dist.,* 124 Fed. (2d) 1. The preference that we are talking about in this case consists in a discrimination in favor of the California National Bank to the detriment of the appellants. Call it unequal treatment, discrimination, bad faith, it is of course a preference, but it is not good faith merely because the preferential payment was made more than four months prior to the filing of the petition for composition.

II. THE INTERLOCUTORY DECREE IN THIS CASE IS NOT GOOD BECAUSE THE COURT DID NOT FOLLOW THE MANDATORY PROVISIONS OF THE BANKRUPTCY ACT REQUIRING IT TO INVESTIGATE THE CIRCUMSTANCES SURROUNDING THE DEPOSIT OF THE SECURITIES AND THE QUESTION WHETHER FISCAL AGENTS WERE OR WERE NOT PROPERLY COMPENSATED, AND FAILED TO MAKE A FINDING AND ADJUDICATION ON THAT QUESTION.

The Court's opinion below suggests that this point is an afterthought of a "recalcitrant minority".

The Court seemed further to be impressed by the view that the plan of composition was "recommended

by 95% of the creditors". We believe that the trial Court also was unduly impressed by this factor. It is respectfully represented that a minority, regardless of how small it may be, has the undeniable right to protect its property interests. It is always a recalcitrant minority which asserts and establishes rights in a democracy, for the majority can always get its own way without such actions. In the very case of *Case v. L. A. Lumber Products Co.*, 308 U. S. 106, 60 S. Ct. 1, which the Circuit Court does not even mention in its opinion, where the plan was consented to by over 90% of the creditors the Court declared: "All those interested in the estate are entitled to the Court's protection", and declared that "the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one". The fact that they did so approve "is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of a large bond issue". (The bond issue was nearly $4,000,000.)

The present bankruptcy act was passed August 16, 1937. (c. 657, 50 Stats. 654.) When the statute was so passed it had no provision requiring the Court to make the examination which appellants claim the Court failed to make. Appellants' answer was filed December 10, 1938. (R. 36.) The case was heard February 27, 1940. (R. 49.) At this stage in the proceedings it was Congress that had an afterthought, for on June 28, 1940, by c. 438, secs. 2, 3, 54 Stats. 668, 669, Congress amended the statute to provide that the Court should make the examination referred to. It was not

until March 8, 1941 (R. 241-263) that the Court made its findings and decree. The duty was upon the Court to make this examination, which it did not do, but should have done with view to satisfying the statute which was passed after the hearing. There was no obligation upon the appellants to object to the findings or decree on this basis. No cross findings need be submitted by the defeated parties. *Penmack Corp. v. Esterbrook Steel Pen. Mfg. Co.*, 27 Fed. Supp. 86. *Detective Comics, Inc. v. Bruns Publications, Inc.*, 28 Fed. Supp. 399. See Rule 52, Federal Rules of Civil Procedure.

While the amounts which were paid in costs and expenses could not serve to diminish the amount (as shown by the record) which the appellant was to receive by the plan, the appellants pointed out in their brief that nothing was shown e. g. as to what compensation Paul W. Curtis as Secretary of the Bondholders' Protective Committee might have obtained. (R. 88.) Nor were any of the circumstances surrounding the obtaining of the consents of the original bondholders shown to the Court. We believe it was the intent of Congress that an inquiry should be made by the Court into all these circumstances. In the case cited by the lower Court in its opinion (*American United Mutual Life Ins. Co. v. City of Avon Park*, 61 S. Ct. 157, 311 U. S. 138, the Supreme Court said:

> "The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, the amount paid therefor and the like.

> Only after such investigation can the court exercise the 'informed, independent judgment * * * which is an essential prerequisite for confirmation of a plan.' And that is true whether the assents to the plan have been obtained prior to the filing of the petition or subsequent thereto."

We respectfully contend that the investigation positively must be made and that in this case it was not made.

III. AS A MATTER OF LAW THE FINDINGS, DECREE AND RECORD FAIL TO ESTABLISH THAT THE PLAN IS FAIR; NOR CAN FAIRNESS BE DETERMINED FROM THE RECORD, FINDINGS OR DECREE.

There is a conflict in the opinions of the lower Circuit Court with respect to the necessity of findings to establish fairness as required by the rule in the *DuBois* case (*Consolidated Rock Products Company v. DuBois,* 312 U. S. 510).

In the case of *Lorber v. Vista Irrigation District,* 127 Fed. (2d) 628, decided by the same Court on April 16, 1942, which decision it will be noted was rendered only two weeks after the decision in the instant case, the Circuit Court pointed out that since the decisions of that Court in the case of *West Coast Life Insurance Co. v. Merced Irrigation District,* 114 Fed. (2d) 654; *Bekins v. Lindsay-Strathmore Irrigation District,* 114 Fed. (2d) 680, *Jordan v. Palo Verde Irrigation District,* 114 Fed. (2d) 691 and *Moody v. James Irrigation District,* 114 Fed. (2d) 685 (all of which decisions are cited by the lower Court in the

instant case) "The Supreme Court decided the case of *Consolidated Rock Company v. DuBois,* supra,[1] which case would indicate that in order to 'exercise the informed, independent judgment * * * which appraisal of the fairness of a plan of reorganization entails', the trial Court should make some finding to support a conclusion that the payments provided for in the plan of composition are all that the District is reasonably able to pay in the circumstances."

Subsequently in the case of *Covell v. South San Joaquin Irrigation District, No. 9788,* the same Court on April 20, 1942 (Mr. Justice Wilbur presiding) made the same ruling, refused to hear arguments on the appeal, and remanded the cause for further proceedings and to make findings on the question of the ability of the district to pay, in other words, on the question of the fairness of the plan.

The gist of this determination by the lower Court in these later cases is that the trial Court failed to find specially the facts upon which to base a conclusion of fairness of the amount offered by the plan.

The findings in the instant case are even more meager than they were in the *Vista* case or in the *South San Joaquin Irrigation District* case (R. 241 at 247); the only finding is that the "plan is fair and equitable and for the best interest of the creditors".

In the *South San Joaquin* case there was a finding (R. 151 in that case) "That the payments to be made as provided in said plan of composition are the full

[1]*Consolidated Rock Products Co. v. DuBois,* 312 U. S. 510, 61 S. Ct. 675.

amount which petitioner is able to pay on its aforesaid indebtedness". Mr. Justice Stephens (who wrote the opinions in the first group of water district cases cited above) stated at the hearing on April 20, 1942 that the Court had considered that finding and was of the opinion that it was a conclusion of law and not a finding of fact.

It will appear from the decision in the *Vista* case (supra) that the Ninth Circuit Court of Appeals did not remand the case for further hearing based upon a determination which was or could be made from the record as to the fairness of the plan. The Court definitely thought that the case should be remanded because the lower Court had failed to make findings indicated by the *DuBois* case and presumably to establish a rule for lower Courts to follow in the preparation of their findings. Subsequently, when the case of Paradise Irrigation District (*J. R. Mason, Appellant v. Paradise Irrigation District, Appellee,* No. 9925 in the United States Circuit Court of Appeals for the Ninth Circuit) came up for consideration in that same Court, an order was made remanding that case on May 14, 1942 the order reading:

> ORDER REMANDING CAUSE FOR FINDINGS, ETC.
>
> "Upon appeal from the District Court of the United States for the Northern District of California, Northern Division.
>
> This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of California, Northern Division, and was duly submitted:

> On Consideration Whereof, It is now hereby ordered by this Court that this cause be, and hereby is remanded to the said District Court with directions to make specific findings bearing on the question of the maximum amount that the District is reasonably able to pay is bondholders in the circumstances, either with or without the taking of additional evidence as said District Court in its discretion may determine. See Lorber v. Vista Irrigation District, ... Fed. (2d) ..... (CCA 9 Apr. 16, 1942) Consolidated Rock Products Co. et al. v. DuBois, 312 U. S. 510, 65 S. Ct. 675. The District Court shall further clarify its findings on the question whether the plan of composition provides for deductions from the amount to be paid for coupons which have been voluntarily paid by the Irrigation District.
>
> It Is Further Ordered that the submission of said cause be, and hereby is set aside. (Garrecht, C. J. does not concur.)"
>
> (..... Fed. (2d) .....)

It will be noted that Circuit Judge Garrecht who wrote the opinion in the instant case for the Ninth Circuit Court of Appeals did not concur in the order made in the *Paradise Irrigation District* case and his non-concurrence is evidently the view of Circuit Judges Wilbur[2] and Healy, who joined with him in making the order refusing to grant a rehearing in the instant case on the grounds, presumably, that in the view of the Court the record does sustain the prop-

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[2]But Judge Wilbur joined in the order in the *Covell* case, supra.

osition that 50.5 cents is all that the district is able to pay and that the case should not be remanded for failure of the findings to support this conclusion.

Here, however, is a definite, positive disagreement evidenced by the opinion of the same Circuit Court of Appeals, made May 29, 1942 in the instant case which reads:

> "Before: WILBUR, GARRECHT and HEALY, Circuit Judges:
>
> It is hereby ordered that the opinion of this Court filed in the above entitled case on the 30th day of March 30, 1942, be, and the same hereby is amended by adding to the paragraph ending on line 6, page 6 of said opinion, the following sentence:
>
> "It is apparent from the record that the amount to be paid the bondholders of 50½ cents on the dollar is all that can reasonably be paid in the circumstances."
>
> (..... Fed. (2d) .....) (R. 307.)

Petitioners urge that a review of this case should be granted.

Petitioners go further and contend that as a matter of law the record in this case cannot support a finding of fact or a conclusion of law as to fairness, because the taxpaying ability of the property in the City of Placerville was not taken into consideration and no examination was made as to the property values in this city. The entire area and real property in this city is within the El Dorado Irrigation District and is a part of the security for this bonded indebtedness. Unless it be known what the taxpaying ability is, how

can it be determined as a matter of law whether the plan is fair? As a matter of fact, the evidence in the case was based almost exclusively upon the taxpaying ability of the pear growers occupying about one-sixth of the area of the district. The Court did not seem to be interested in industries, mining, or the taxpaying ability of the City of Placerville.

Further, unless the evidence furnished the Court by a petitioner under this statute includes the customary financial statement supplied by a municipality when it enters the market to borrow money, including the assessed valuation of property subject to tax, and its estimated true value, the record of taxes levied, delinquencies, tax sales and amount realized from the sale of escheated lands, value of land acquired for delinquent taxes and unsold, revenue derived anually from tax levies, water tolls, redemptions of delinquent property, ground rents, crop shares and other sources of revenue available, how is it possible to determine as a matter of law or fact whether the money offered in a plan of composition is "fair and equitable" and "does not discriminate either for or against any creditor", especially when the bonds which it is sought to get a discharge from are held by the State Supreme Court to constitute general obligations payable from unlimited *ad valorem* taxes on all privately held land within the district boundaries, and which taxes must be levied annually at rates sufficient to pay contracts due and to become due within the year, and which taxes if not collected when due become a lien against the property taxed ranking ahead of pre-existing

mortgages and even maturing into tax title ahead of general taxes levied by other taxing[1] authorities.

Bolton v. Terra Bella Irr. Dist., 106 Cal. App. 313;

Calif. Loan & Trust Co. v. Weis, 118 Cal. 489;

Anderson Cottonwood I. D. v. Klukkert, 13 Cal. (2d) 191;

Anderson Cottonwood I. D. v. Zinzer, 51 A. C. A. 791 (Apr. 29, 1942).

Respondent, ever since 1932 has violated the mandatory laws of its creator, in that it has failed to levy the taxes at rates annually as is mandatory under Sec. 39 (Cal. Stat. 1919, p. 472).

Selby v. Oakdale Irr. Dist., 140 Cal. App. 171.

To allow the decree below to stand would be to give a windfall to every holder of a mortgage on property within this district, and also sanction many years of law violation before the filing of the petition.

Your petitioners have had no interest at all for ten years and very respectfully submit that to now be forced to take $505 for each $1000 6% bond, although not due for many years, with less than 20% of more than $600 of defaulted interest on each bond (R. 259), from a thriving community that is more than solvent, while others have been paid 82½% of principal and

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[1]The State takes 5 years to obtain tax title; Irrigation District only 3 years.

Cal. Political Code 3785;

Sec. 47, "the California Irrigation District Act" amended Cal. Stat. 1939, p. 1576.

interest, would not qualify as "fair and equitable" by any known standard, and would more correctly be branded as confiscation than composition.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted, the decree of the Court below reversed, and the proceeding directed to be dismissed.

Dated, Turlock, California,
August 12, 1942.

Respectfully submitted,
W. COBURN COOK,
Counsel for Petitioners.

(16)

FILED
SEP 8 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 305

E. J. THOMAS, J. R. McDONALD, J. R. MASON, E. G. WILLIAMS, and A. C. CARPY,
Petitioners

vs.

EL DORADO IRRIGATION DISTRICT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION THERETO

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OPINION BELOW

The opinion of the Circuit Court of Appeals, Ninth Circuit, is reported in 126 Fed (2d) 922.

STATEMENT OF THE CASE

Respondent does not deem it necessary to furnish an entire new statement of the case, but will confine its statement

to an enlargement of the statement of facts made by petitioners.

In this statement the Respondent desires to call the Court's attention to the fact that two applications were made to the Reconstruction Finance Corporation by the Respondent District, the first having been an attempt to obtain a loan which would have permitted the payment of a larger amount to the bondholders than that finally agreed upon. That first petition was rejected by the Reconstruction Finance Corporation and a new petition filed, which petition was granted in an amount slightly less than the amount the District has agreed, in its plan of composition, to pay the bondholders; thus indicating that the District has always desired and attempted to pay the bondholders the greatest amount possible (the difference between the amount received from the Reconstruction Finance Corporation and the amount paid has been supplied by the District).

After the first Municipal Bankruptcy Act was held unconstitutional and prior to the adoption of the present Municipal Bankruptcy Act, the District did, on February 5, 1937, make an offer to the Receiver for the California National Bank and *to the petitioners herein*, offering to endeavor to obtain an increase in the loan from the Reconstruction Finance Corporation in an amount sufficient to pay the bondholders and warrant holders in "full the face value of their bonds, plus accrued interest, less 17½% discount on the total amount." The offer was accepted by the Receiver of the California National Bank, but was rejected by the petitioners herein as "not acceptable" (Transcript of Record, page 132)

Said offer was made at a time prior to the adoption of the Municipal Bankruptcy Act under which this proceeding was

held and when there was no relief available to the Respondent under the National Bankruptcy Act. The offer was not only rejected by the petitioners herein, but these identical petitioners continued harrassing the Respondent District with litigation, having filed one action against the Respondent District on the 8th day of March, 1937 and another one on the 26th day of March, 1937, (only a little more than a month after said offer was made). There is nothing in the record to indicate that the offer contained in the letter of February 5, 1937, was with drawn until the filing of the petition for confirmation of plan, October 7, 1938, twenty months after the offer by the District and acceptance by the Receiver for the California National Bank and after rejection by the petitioners.

Counsel for petitioners states the dates and recitals are important, and we agree with that statement. The importance of the dates and recitals, indicated by the foregoing statement, is apparent, and in view of some of the points made by petitioners, the following dates and recitals are equally important. The hearing in this case was held before the United States District Court on the 27th day of February, 1940, the hearing was concluded and the matter submitted on briefs and, as pointed out by the petitioners on page 6 of their petition, Sec. 3, Public 669, 76th Congress, was approved on June 28, 1940, four months after the conclusion of said hearing, although Findings in this case were not signed nor filed until March 8, 1941. Thus, at the time of the actual hearing the amendment referred to as requiring the careful examination of contracts, proposals, acceptances, deposit agreements and all other papers relating to the plan, was not in effect although the same was in effect when the Findings were signed and entered. However, there is evidence of record that there was at least a full and fair

disclosure upon which a Finding could be based. This, manifestly, is true, for in its decision the Circuit Court of Appeals said:

> "The petition of the District, the acceptance by the Reconstruction Finance Corporation, the stipulations entered into, and other exhibits make full disclosure of all matters concerning the relationship of the parties. The Reconstruction Finance Corporation, a Government agency, supplied the funds for the relief of the embarrassed debtor, to make the reorganization plan workable. The escrow agreements were all before the court. There was full disclosure. Indeed, the only omission that appellants' industrious scrutiny seems to have been able to discover, as asserted in their brief, is that the District in its petition had failed to separately state the amount of its warrant indebtedness and it is suggested that this was deliberately done in bad faith. However, this inadvertence was so evident that appellant, in reference to the omission, further says:
>
> 'It is so obvious that even the R. F. C. failed or declined to hide the fact that its 'acceptance' of the plan embraced the plan of warrant liquidation. * * * The Court authorized the 'purchase' of the warrants as well as the bonds. The plan of composition, if any, still explicitly includes the warrants'."
>
> Thomas et al vs. El Dorado Irrigation District, 126 Fed. (2d) 922, 926.

However, as pointed out by the Circuit Court of Appeals in this case, in the paragraph just following the foregoing quotation, the Court did make a finding which is as follows:

> "That all amounts to be paid by petitioner for services and expenses incidental to the composition of its indebtedness have been fully disclosed and are reasonable

and the offer of the plan and its acceptance are in good faith."

Transcript of Record page 257.

While the quotation, just given, appears in the Interlocutory Decree, nevertheless, it is an indication that the Court was acting with a full realization of the situation and full knowledge of all facts, and took cognizance of the fact that there had been a full and complete disclosure.

Should there be any question as to whether or not the Court properly found on that matter, an answer to that contention is that in its decision, the Ninth Circuit Court of Appeals corrected such failure by the statement made in its decision and hereinabove quoted. The power of the Circuit Court of Appeals to correct such errors can not be questioned for that is a power granted Circuit Courts of Appeal by the Bankruptcy Act itself.

Sec. 24, subdivision b of the National Bankruptcy Act provides as follows:

> "The several Circuit Courts of Appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final to *superintend and revise* (italics ours) in matter of law (and in matter of law and fact the matters specified in Sec. 25) the proceedings of the several inferior Courts of Bankruptcy within their jurisdiction."

Certainly the right to *superintend and revise* gave the Circuit Court of Appeals the right to supply any deficiency in the Findings.

In re Taft, 133 Fed. 511.

ARGUMENT

The petitioners make three points in support of their petition for Writ of Certiorari, said points being as follows:

1. That the plan of composition discriminates unfairly against the petitioners and in favor of the Receiver for the California National Bank, claiming a preference in favor of that creditor.

2. That the interlocutory decree did not follow the mandatory provision of the act requiring an investigation of the circumstances surrounding the deposit of securities and the question of compensation of fiscal agents claiming further that the failure to make a Finding on that question was fatal.

3. That the Findings and Decree failed to establish that the plan is fair and that the same can not be determined from the record, findings, or decree.

Respondent will answer these questions in the order presented.

There Was No Discrimination, No Secrecy, and No Preference Granted The Receiver For The California National Bank, Nor Was There Any Lack of Good Faith In The Trasaction.

As has been pointed out in the Respondent's statement of facts, the offer to settle on the basis of a discount of 17½% was made openly and fairly, and the petitioners in this case given the same opportunity as was afforded the Receiver for the California National Bank, but in the language of Counsel for petitioners the "offer was not acceptable by any of the re-

spondents herein." (The word "respondents" in that stipulation relating to the petitioners in this proceeding.) That statement appears in a stipulation as to facts filed on behalf of respondents in the Court below (petitioners in this proceeding.) The stipulation in question was prepared by the attorney for these petitioners and offered by him in evidence.

> Transcript of Record page 128 to 137. (The statement referred to appearing on page 132).

As has been pointed out before, not only was the offer rejected, but these identical petitioners continued to harrass the District with suits seeking judgment on these obligations until the Respondent District, shortly after the adoption of the new Municipal Bankruptcy Act, filed the petition which resulted in the proceedings now before this Court. Does Counsel contend that after having received an offer of compromise, and after he, acting on behalf of these petitioners, had commenced the two actions above mentioned, that the offer should have been held open even though the only non-consenting bonds of the District were in the hands of the petitioners (the petitioners were the plaintiffs in the action just mentioned)? The fact of the institution of these actions was neither disputed nor questioned in this proceeding and surely should be taken as a complete rejection of the offer.

However, we wish again to point out that the offer and acceptance by the California National Bank was made approximately twenty months prior to the filing of the petition in this case, and for that reason certainly can not be construed as a preference. Moreover, call the transaction a preference or whatever one likes, certainly it is not indicative of any bad faith or lack of good faith on the part of Respondent, for there was no secrecy about it, the same offer was made to petitioners,

and as the Court below said in the instant case, everything was open and above board. Certainly there was no attempt to defeat any of the purposes of the Bankruptcy Act or any portion thereof. It has been said that a preference is not in itself evil, but is merely one prohibited by the Bankruptcy Act.

Canright vs. General Finance Corporation, 35 Fed. Supp. 841. While it it is also recognized that the main purpose of the provisions of the Bankruptcy Act against preferences is to protect all creditors against secret preferential liens.

In re Seim Construction Co. 37 Fed. Supp. 855.

Petitioners cite the case of Roberts vs. Board of Public Instruction, 117 Fed. (2d) 943, and we feel that rather than being in support of the petition, that if the case is carefully read, it would support the position of the Respondent, for in that case it was the Appellant who was guilty of taking inconsistent positions, just as in this case, it is the petitioners who are now complaining of a preference they themselves rejected, not because of its inequity, but because of their desire to obtain an even greater preference. In the Roberts case the Court said that,

> "His predicament is a result of his own contriving under circumstances depriving it of equitable appeal."

Continuing, the Court said:

> "The appeal, if made under different circumstances, might well have prevailed. When, however, his situation is considered in the light of the circumstances which have brought the situation about, it is seen that the equity he claims is not the real equity of one caught without fault, in a bad situation, but only a pretended one. For his situation as a result of concert with, and attempted artifice

in the interest of Wright & Company, to block by appealing to equity, what they could not legally prevent, in order to extort recognition of their bonds which have been adjudged invalid. . . . . Proceedings in Bankruptcy are ruled by equitable considerations and the invoked provisions of the Act, that the plan must not discriminate unfairly in favor of any creditor or claims of creditors, has no application to this case. Compositions of all kinds under the original Bankruptcy Act, and as provided for in later acts, are grounded on questions of purest equity and proceedings under Statutes authorizing them have always required openness and fairness of dealing."

The Court then goes on to say that secret deals are frowned upon.

Now, where is the equity of petitioners' position and where was there any secrecy in the offer to the petitioners and the Receiver for the California National Bank? Surely the petitioners are not placing themselves in a favorable position when they come to this Court and say that, "one creditor obtained a preference over me, and I am denied the same treatment, my denial being caused by the fact that I rejected that preference and sought even a greater preference." We are certain that the petitioners are not instituting this proceeding in defense of the 96% of the bondholders who accepted the offer originally, nor are they carrying it on in defense of the Receiver of the California National Bank who received 82½%, but now their cry is that they have been deprived of the same treatment that was given that creditor after having had a full twenty months to accept and avail themselves of equal treatment. Other cases cited by petitioners in support of their cry of bad faith are

U. S. vs. Greer Irrigation District 121 Fed (2d) 675;
Zavelo vs. Reeves 227 U. S. 625;
Texas Hotel Corporation vs. Waco Development Co. 87 Fed (2d) 935;
John Hancock Mutual Life Insurance Co. vs. Bartels 308 U. S. 180;
American United Mutual Life Insurance Co. vs. City of Avon Park, 311 U. S. 138;
In re Cook 104 Fed (2d) 981;

None of said cases are in point herein. The Greer case being merely a case where the District and the land owners appeared in eminent domain proceedings in an attempt to increase the valuation. The Zavelo case involving the case of a promise made after the filing of a petition. The Texas Hotel case merely holding that the acquisition of claims to obtain a more favorable settlement was not inequitable. The City of Avon Park case holding that securities obtained under questionable circumstances should not be allowed a vote. While in the Cook case, the Appellee had filed a petition in order to escape jurisdiction of the State Court, and the Hancock case holding that the requirement of *good faith* hits at *secret efforts* to *favored creditors*. Certainly there was no secret effort and no favored creditors when these petitioners were offered the same favor that they now complain of.

The Interlocutory Decree Did Follow the Provisions of the Act Even Though the Amendment Was Adopted Subsequent to the Conclusion of the Hearing. Any Deficiency in the Findings Was Corrected by the Ninth Circuit Court of Appeals.

As pointed out in Respondents' statement of facts, there was a fair disclosure of all proceedings, none of the parties to

this matter were misled, and have at all times been fully advised of all matters. A full and fair disclosure was made to the Court and any lack in the Findings was certainly corrected by the Circuit Court of Appeals in the decision below. Counsel complains that there is no showing as to what compensation Paul W. Curtis, as secretary for the Bondholders' Protective Committee might have received or obtained, and since Counsel relies on the record which was prepared under his direction, it is desired to point out that there is no evidence regarding the employment of Paul W. Curtis or any other person as fiscal agent of the district; it is also desired to point out that the name "Paul W. Curtis" appears only twice in the record, once on page 75, in which Paul W. Curtis appears to have written a letter to F. N. Hosking, Engineer-Manager of El Dorado Irrigation District and again on page 88, where mention is made of the fact that Paul W. Curtis was Secretary of a Bondholders' Protective Committee. The last reference appears in Exhibit 5 attached to the District's Stipulation of Facts, said Exhibit 5 being an application to the Reconstruction Finance Corporation filed in August of 1933 (transcript of record, pages 80 to 94 inclusive) there being no reference to Mr. Curtis having acted in any other capacity.

Furthermore, it is respectfully submitted that the consent of the creditors is based upon the consent of the Reconstruction Finance Corporation, bearing date of the 2d day of September, 1938, (transcript of Record, pages 19 to 22 inclusive) the Reconstruction Finance Corporation having purchased said bonds and all warrants, pursuant to an order of the United States District Court, which appears in the transcript of record, pages 64 to 67 inclusive. Prior to such purchase, said bonds were deposited with the Bank of America National Trust & Savings Associa-

tion in escrow, the form of the deposit being shown by the Escrow Agreement appearing in the Transcript of record, pages 68 to 71 inclusive.

Surely it cannot be contended that Mr. Curtis was acting as the negotiating agent of the Reconstruction Finance Corporation.

However, as we have indicated in the Statement of Facts, the Trial Court, in its Interlocutory Judgment, did find that the amounts to be paid were reasonable and were there any deficiency in the findings, the same was supplied by the Circuit Court of Appeals.

The Findings, Decree and Record Establish That the Plan Is Fair and the Same Can Be Determined From the Record, the Findings and Decree.

This case was tried in a few hours, and both the Respondent District (petitioner in the District Court) and the petitioners in this Court (Respondents before the District Court) prepared lengthy stipulations as to facts and then supplemented those stipulations as to facts with such additional evidence as was necessary. These stipulations fully cover the entire situation and certainly are a fair disclosure.

It is not disputed that the Reconstruction Finance Corporation is now the owner of all of the warrants and all but twenty of the bonds, which twenty are held by the petitoners herein. The facts clearly show that the Respondent District in this case did not, because of an agreement with the bondholders, levy taxes and charge water tolls in an amount sufficient to pay the entire interest on its bonded indebtedness, but levied a tax rate and collected a water toll which it was agreed was all the land owners and water users were able to pay.

It is desired to point out that the bonds which were being retired under this proceeding had a market value of not more than $230.00 per bond when the RFC loan was granted, being less than 50% of the amount the bondholders are realizing under the plan of composition, which in itself indicates its fairness, the fact that 96% of the bondholders had consented also being an indication of the fairness of the plan.

The petitioners complained because the assessed value of the lands in the District exceed the amount of the bonded indebtedness, and we wish to point out that they have no lien or claim on the District's assets; that the assets of the District are only valuable to the District, and that the value of both the lands and the District's assets are dependent upon the continued operation of the District.

All these matters were before the Circuit Court of Appeals and before the District Court and were fully considered by it.

Counsel for petitioners does not seem to be able to distinguish the difference between a "composition" of this kind and actual bankruptcy, but at least one of the cases cited by Counsel for petitoners indicates that there is a vast difference between the bankruptcy of a Public Entity and the bankruptcy of a private person.

See Lorber vs. Vista Irrigation District, 127 Fed. (2d) 628;

Newhouse vs. Corcoran Irrigation District 114 Fed (2d(690;

In the Lorber case, after quoting from the Newhouse case, the Court points out that in these cases the test is the ability or inability of the District to pay, and while that case was remanded, it was remanded for the sole purpose of enabling the Court to make a finding as to whether or not the District could pay

more, leaving it to the discretion of the Court as to whether that finding be made with or without the taking of additional evidence; but in the present case the Circuit Court of Appeals corrected any failure of the District Court when, in denying a petition for re-hearing, it added the following sentence to the decision:

> "It is apparent from the record that the amount to be the bondholders of 50½ cents on the dollar is all that can reasonably be paid under the circumstances."
>
> 126 Fed (2d) 922.

See Petitioners' brief in support of petition for Writ of Certiorari, Page 27.

CONCLUSION

There being no important questions of law to determine, no conflict in decisions, no errors which need correcting, no lack of good faith and no unfairness, it is respectfully submitted that the petition should be denied.

Dated: Placerville, California, August 29, 1942.

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